

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002



DATE: October 3, 2000
CASE NO. 2000-INA-87

In the Matter of:

JOHN R. BARTELS, JR. & WILLIAM BARTELS,
Employer

On Behalf of:

NAJMUDIN HOSEIN,
Alien

Appearance: Gary T. Jodha, Esquire
For the Employer

Before: Holmes, Vittone, and Wood
Administrative Law Judges

Certifying Officer: Delores DeHann

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United

States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On June 12, 1997, the Employer, John R. Bartels, Jr. and William Bartels, filed an application for labor certification to enable the Alien, Najmudin Hosein, to fill the position of Household Cook-West Indian Dishes, which was classified by the Job Service as "Cook (Household) Live-Out" (AF 20).¹ The stated job duties for the position, as set forth on the application, are as follows:

Planning menus, cooking, preparing and serving meals, ordering and purchasing foodstuffs. Meals include preparation of halal meat, various curried dishes; various forms of roti and desserts, include jelebe, khurma, barfie, laddo and peers, etc.

(AF 20). The only stated job requirement for the position is two years of experience in the job offered (AF 20).

In the Notice of Findings ("NOF") issued on June 21, 1999 (AF 25-29), the CO proposed to deny certification on the grounds, *inter alia*, that the Employer had failed to establish that the job opportunity is clearly open to U.S. workers under § 656.20(c)(8); and, that the stated requirement of 2 years of experience in West Indian Style cooking is unduly restrictive, pursuant to §656.21(b)(2).

The Employer filed a rebuttal, dated July 22, 1999, which consists of a letter by Employer's attorney (AF 30-33) and supporting documents (AF 36-51). On August 26, 1999, the CO issued a Final Determination denying certification (AF 34-35). Although the CO found that the Employer has successfully rebutted the first deficiency under §656.20(c)(8), she determined that the Employer had failed to successfully rebut the second issue under

¹The Appeal File indicates that the job title, duties, work schedule, and pay rate were all amended. (*Compare* AF 6, 20).

§656.21(b)(2). (AF 34-35). On or about September 28, 1999, the Employer filed a Request for Review (AF 52-53). The CO subsequently forwarded this matter to the Board of Alien Labor Certification Appeals for review.

Discussion

Pursuant to 20 C.F.R. §656.21(b)(2), an employer is required to document that the requirements for the job opportunity are not unduly restrictive. This can be established by showing that the stated requirements are those normally required for the performance of the job in the United States and as defined for the job in the Dictionary of Occupational Titles (D.O.T.), or by documenting that the requirement arises from business necessity.

Since the West Indian cooking requirement is clearly not a usual requirement, nor is it listed under the applicable D.O.T. (*See Cook, Domestic D.O.T. 305.281-010*), the Notice of Findings provided the Employer with two alternatives to cure this deficiency; namely, submit evidence that the requirement arises from business necessity or delete the requirement (AF 25-26). In its rebuttal, the Employer chose to retain the requirement and tried to establish that it arises from business necessity (AF 31-32).

To document the business necessity of a seemingly restrictive requirement under §656.21(b)(2)(i), an employer must demonstrate that the job requirement bears a reasonable relationship to the occupation in the context of the employer's business and is essential to perform, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 88-INA-82 (Feb. 8, 1989)(en banc).

In the present case, the Employer's "rebuttal" regarding this issue consists of the following statement by Employer's attorney:

Before the alien was hired for this position the employer had other persons prepare meals on a trial basis. The employer was not satisfied with the manner in which the meals were prepared. Moreover, the employer was unable to find anyone with a background in West Indian meal preparation. The employer himself does not know how to prepare West Indian dishes.

The job as currently described existed before the alien was hired. Payroll records substantiating the employment of the previous cook whose cooking abilities included the preparation of West Indian cooking are not available. They were filed by William Bartel's father who is deceased.

(AF 32).

In the Final Determination, the CO found the rebuttal unpersuasive regarding this issue,

because the Employer failed to establish that an experienced, without two years of specialized cooking experience in West Indian foods, could not perform the job (AF 34). We agree.

Specifically, the Employer failed to document that the two year experience requirement in West Indian cooking is essential to perform the job duties. For example, the Employer did not document that, an otherwise experienced cook cannot perform the job duties by simply obtaining West Indian recipes, following such recipes, and making adjustments to suit Employer's taste, without requiring two years of experience in West Indian cooking. Luis Orellana, 1999-INA-122 (Jan. 14, 2000) Teresita Tecson 94-INA-14 (May 30, 1995).

In this case, as in *Orellana, supra*, the Employer has done no more than make unsubstantiated assertions that such experience is necessary. It is well settled that unsupported conclusions are insufficient to demonstrate that the job requirement is supported by business necessity. *See generally, Our Lady of Guadalupe School*, 88-INA-313 (June 2, 1989); *Inter-World Immigration Service*, 89-INA-490 (Sep. 1, 1989), citing *Tri-P's Corp., d/b/a Jack-In-The-Box*, 87-INA-686 (Feb. 17, 1989).

Accordingly, we find that the CO's denial of labor certification was proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.